IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. [redacted]16

JERRY DOUGLAS MEMPA,

Petitioner,

vs.

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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SUPREME COURT OF THE STATE OF WASHINGTON

Jerry Douglas Mempa prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above-entitled case on June 23, 1966.

OPINION BELOW

The opinion of the Washington State Supreme Court, reproduced in Appendix B hereto, infra, pp. B-1 to B-15, is reported in 68 Wash. Dec. 2d (Advance Sheets) 871, ___ P.2d ___ (1966).

JURISDICTION

The opinion of the Court below was filed on June 23, 1966 (T. 1/ 49; Appendix B, infra, p. B-1). In Washington, no separate judgment is entered. The jurisdiction of this Court is invoked

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1/ "T" refers to the record of the proceedings in the court below, which is entitled "Transcript on Petition for Certiorari" on its cover.

under 28 U.S.C., § 1257(3), because rights are claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment confer a right to counsel during a state court probation revocation proceeding?

2. Does the Fourteenth Amendment confer a right to counsel at the sentencing and judgment stage of a state court criminal proceeding?

3. If such a right to counsel exists, and in the absence of waiver, must counsel be appointed for a defendant unable to employ counsel?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Sixth Amendment,

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence,"

and Section 1 of the Fourteenth Amendment of the Constitution of the United States,

> " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions involved are sections 9.54.020, 9.95.200, 9.95.210, 9.95.220, 9.95.240 and 10.40.175 of the Revised Code of Washington, and 78 Stat. 552, 18 U.S.C. § 3006A (b). They are reproduced in Appendix A, infra, pp. A-1 to A-3.

STATEMENT OF THE CASE

On May 26, 1959, an information (T.9) was filed in the Superior Court of the State of Washington for Spokane County, charging petitioner with the crime of "violating section 9.54.020

(Appendix A, infra, p. A-1) of the Revised Code of Washington, commonly known as 'Joy Riding,' " in that petitioner did "without the permission of the owner or person entitled to possession thereof, intentionally take and drive away a motor vehicle, to wit: a 1956 Chevrolet automobile, . . ."

Counsel was thereafter appointed to represent petitioner, and on June 17, 1959, he was arraigned before the Spokane County Superior Court. Petitioner entered a plea of guilty to the "joy riding" charge and an Order of Probation (T. 10) was thereupon entered, placing petitioner on probation for two years, and providing for thirty days confinement as a condition of probation. The imposition of sentence was deferred pursuant to the provisions of RCW 9.95.200 and 9.95.210 (Appendix A, infra, pp. A-1 to A-2), and petitioner was instructed to remain under the supervision of the State Parole Office.

Petitioner was seventeen years old when he pleaded guilty and was placed on probation. He had not completed the eighth grade, and since 1956 he had progressed through a variety of juvenile and mental institutions within the State of Washington, with a conflict of opinion between two of the facilities as to whether he was a psychopathic delinquent (T. 27-28). His first appearance in Superior Court arose out of the above-described offense (Appendix C, infra, pp. C-13 to C-14).

Approximately four months after petitioner was placed on probation, the Spokane County Prosecutor's office moved to have his probation revoked on the ground that petitioner had been involved in a burglary on September 15, 1959 (T. 11, 12). Accordingly a hearing was held in the Spokane County Superior Court on October 23, 1959. Petitioner, still seventeen years old, was accompanied to the hearing by his stepfather. He was not represented by counsel and the court made no inquiry concerning the

appointed counsel who represented petitioner four months earlier. Petitioner was not advised of a right to counsel, and he was not asked if he wished to be represented by counsel (T. 16, 36). The Court asked petitioner if he had been involved in the alleged burglary, and petitioner answered in the affirmative (T. 22). Following petitioner's admission, the Court heard testimony from William D. Weaver, a parole and probation officer, and the crucial portion of the proceedings went as follows (T. 23):

> "THE COURT: Just make it short and sweet. You made the report in this connection and you state that the boy denied breaking into the place out there, wherever it was?
>
> "A That is correct.
>
> "THE COURT: And he did so deny it?
>
> "A Yes.
>
> "THE COURT: All right, that's all. Hand up the order revoking the probation. I'm signing the order revoking the probation that I previously granted you. Now, stand up, Jerry. Probation having been revoked, it is the further judgment of the Court that you be confined in the Washington State Reformatory for a maximum period of ten (10) years."

Without affording petitioner an opportunity to cross-examine the witness or state anything in his own behalf, the court entered an Order revoking probation (T. 12). Judgment was entered upon the previous plea of guilty to "joy riding" and petitioner was sentenced to imprisonment for a maximum term of ten years (T. 13). Petitioner was not advised of his right to appeal, and no appeal was taken.

In 1965, petitioner filed a pro se petition for writ of habeas corpus (T. 0-2) with the Washington State Supreme Court, alleging that the judgment and sentence of October 23, 1959, [2/]

2/ The petition for habeas corpus says judgment and sentence were entered on June 17, 1959. This is incorrect, as the record demonstrates. T. 13. Petitioner was pro se when the petition was filed, and he was mistaken about the dates.

was void because he had not been represented by counsel during the probation revocation hearing, nor at the time of sentencing. The petition for writ of habeas corpus relied upon the Washington State Constitution and the Sixth Amendment to the Constitution of the United States. 3/

A comprehensive opinion was delivered by the Washington State Supreme Court on June 23, 1966, denying the application for habeas corpus by a vote of six to three. Appendix B, infra.

The majority opinion states the issue in this fashion:

> "The basis of this petition for a writ of habeas corpus may be concisely described as follows: Jerry D. Mempa was not represented by counsel at the peremptory hearing in the Spokane Superior Court when (a) his probation status was revoked, (b) the deferral of sentence was vacated, and (c) its imposition took effect forthwith. Thus, the problem presented to us for decision is whether probationer Mempa was entitled to counsel as a matter of constitutional right in relation to any one or all of the foregoing aspects of administration of the state probation system." (Appendix B, infra, p. B-2)

The Court's opinion is well summarized in this excerpt (Appendix B, infra, p. B-12):

> "We have previously held that there are no constitutional rights respecting the acquisition of probation status. And it is furthermore our reasoning that there are no constitutional rights involved in the termination or revocation of probationary status, or in respect to the concomitant operations of the superior courts involving imposition of either (1) suspended or (2) deferred sentences. The function involved, in terms of definitive action, is essentially quasi-administrative or plenary in nature. The operations are essentially no different from those performed administratively by the State Board of Prison Terms and Paroles or by the prison authorities in administering other phases of penal administration in the state of Washington."

The Court then specifically rejected the authority of Gideon v.

3/ Petitioner, still pro se, was not represented during the oral "argument" before the Washington State Supreme Court. The Attorney General's office appeared for the respondent.

Wainwright, 372 U.S. 335 (1963), and Escoe vs. Zerbst, 295 U.S. 490 (1935), and concluded as follows (Appendix B, infra, p. B-15):

> "No appeal, or a petition for writ of habeas corpus, will be successful in this court where the question is whether the probationer was accorded his constitutional due process rights at the hearing. He simply has none." 4/

REASONS FOR GRANTING THE WRIT

This case presents right to counsel issues as significant and as demanding of resolution by this Court as the issues involved in Gideon vs. Wainwright, 372 U.S. 335 (1963); Escobedo vs. Illinois, 378 U.S. 478 (1964); Douglas vs. California, 372 U.S. 353 (1963); and Miranda vs. Arizona, ___ U.S. ___ (1966). By an anachronistic reliance upon the ancient concepts of "right-privilege" and "the chancellor's grace," the court below held that petitioner did not have a constitutional right to counsel when he was peremptorily hailed into a hearing at which the stakes were his liberty, his reputation, his future record, his appellate remedies, and when, for the first time, sentence was to be imposed upon a criminal charge. The proceeding against petitioner was as critically significant in a constitutional sense as the proceedings in White vs. Maryland, 373 U.S. 59 (1963), and Hamilton vs. Alabama, 368 U.S. 52 (1961).

Recent decisions of this Court have established the right to counsel at various stages of proceedings against an accused. Unfortunately one gap remains -- the area Professor Sanford H. Kadish has labeled "Peno-Correctional" in his article, The

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4/ This holding was made in spite of the respondent's concession that "certain queries present themselves with vigor" as to the fairness of such a hearing where the right to counsel is not afforded. (T. 47). Furthermore, the respondent in effect conceded a portion of petitioner's case, in that respondent urged the court not to retreat from previous rulings that there was a right to counsel at the time of imposition of sentence following probation revocation. (T. 43). The court nevertheless overruled these prior cases. (Appendix B, infra, p. B-11).

Advocate and the Expert-Counsel in the Peno-Correctional Process, 46 Minn. L. Rev. 803 (1961) (hereinafter cited "Kadish, supra"). This case involves the right to counsel during one phase of this gap -- proceedings after conviction following a trial or plea of guilty, and before judgment and sentence are entered.[5/]

I

A PROBATION REVOCATION PROCEEDING IS A PART OF THE CRIMINAL PROCEEDING, AND THE ASSISTANCE OF COUNSEL IS ESSENTIAL TO A FAIR HEARING.

The opinion below characterizes a probation revocation hearing as essentially quasi-administrative in nature, stating that "the operations are essentially no different from those performed administratively by the State Board of Prison Terms and Paroles or by the prison authorities in administering other phases of penal administration in the State of Washington (Appendix B, infra, p. B-12)." But as even the court below has stated, "the courts must look to substance rather than labels in ascertaining whether constitutional rights to the assistance of counsel have been violated." State v. Louie, 68 Wash. Dec. 2d (Advance Sheets) 283, 287, 413 P.2d 7 (1966).

Even acknowledging that the original order granting probation may have been an exercise of "the chancellor's grace," it does not follow

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5/ This case is also of significance to the administration of federal criminal justice. The Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. § 3006A(b) (Appendix A, infra , p. A-1) provides for the appointment of counsel in a "criminal case." United States v. Boyden, 248 F. Supp. 291 (S. D. Cal. 1965) said a probation revocation hearing is a "criminal case," and that accordingly an attorney appointed to represent an indigent in such a hearing is entitled to compensation pursuant to the Act. However, on June 13, 1966, the Comptroller General of the United States disagreed, holding that payment would not be made because such hearings are not "criminal cases" and, further, that there is no constitutional right to legal representation in such a proceeding. GAO; B-156932, June 13, 1966, 34 Law Week 2717. It can safely be anticipated that all federal courts will henceforth not appoint counsel in such hearings, which will pose the retroactivity spectre of Gideon v. Wainwright, supra, if this Court waits until a later day to adopt the position urged herein by petitioner.

that no rights surround its revocation. Cf. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (admission to state bar); Slochower v. Board of Educ., 350 U.S. 551 (1956) (public employment). The fact remains that the recipient of a deferred sentence is ordinarily permitted to return to his community, his family and his job, subject only to behavioral restrictions and conditions arising out of his probationary status. "In a very realistic sense he is free, for his personal liberty is but slightly restricted." (Appendix C, infra, p. C-3, dissenting opinion.)

In the State of Washington, this probationary status may be revoked only if the court finds that the probationer is "violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life." RCW 9.95.220 (Appendix A, infra, p. A-2). Furthermore, of particular significance, the probationer is accorded the right, after a successful probationary period, to come before the Court and petition for negation of his conviction and dismissal of the charges. RCW 9.95.240 (Appendix A, infra, p. A-2 to A-3). He may thus clear his record and remove outstanding penalties and disabilities. These fundamental rights, as stated by the dissent below, "should not be subject to nullification by the whim of peremptory 'quasi-administrative' proceedings which do not even afford the right to be represented by counsel at the time of entering the nullifying judgment and sentence. (Appendix C, infra, p. C-4)."

A probation revocation proceeding is a judicial hearing convened to pass upon the most significant of questions, i.e., liberty, reputation, sentence, etc. It is obviously a time when a defendant wishes and needs to be heard, and when due process protects his right to be heard. As stated by Mr. Justice Sutherland in Powell vs. Alabama, 287 U.S. 45, 68-69 (1932):

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . He requires the guiding hand of counsel at every step in the proceedings against him."

And see Gideon v. Wainwright, supra.

Most federal courts in this country have unfortunately not recognized the right to counsel at probation revocation proceedings. Much of this can be traced to dicta used by Mr. Justice Cardozo in Escoe vs. Zerbst, 295 U.S. 490 (1935), to the effect that "probation or suspension of sentence is an act of grace to one convicted of a crime," and that the Constitution does not require notice or hearing on revocation of the "favor." And see Burns v. United States, 287 U.S. 216 (1932). The result in Escoe v. Zerbst, fortunately, was not as bad as it might seem, for the case goes on to hold that the federal probation statute requires:

> " . . . such notice and hearing as will 'enable an accused probationer to explain away the accusation.' While this does not require 'a trial in any strict or formal sense,' it does require 'an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. [295 U.S., at 493]" Kadish, supra, at 815.

That case, moreover, did not involve the issue of the appointment of counsel, and it preceded Gideon v. Wainwright, supra.

The federal court approach in this area is typified by Brown v. Warden, 351 F.2d 564 (7th Cir. 1965), and the cases cited therein.[6/] The right to counsel during a probation revocation hearing was recognized in United States ex rel Harton v. Wilkins, 342 F.2d 529 (2nd Cir. 1965), but the decision was based primarily

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6/ Many of the federal cases deal with probation after the imposition of sentence, and are therefore distinguishable from this case. See, e.g., Brown v. Warden, supra.

upon Pennsylvania law. Many state courts have also refused to recognize a right to counsel at such hearings. See, e.g., Kadish, supra, at 816. But many states have recognized the right. Id., at 816, fn. 65; Note, Legal Aspects of Probation Revocation, 59 Colum L. Rev. 311, 328-330 (1959). And see Commonwealth ex rel. Remeriez v. Maroney, 415 Pa. 534, 204 A.2d 450 (1964) (hearing to revoke probation and impose sentence is a "critical stage" in the proceedings and right to counsel exists, citing Gideon v. Wainwright, supra, and White v. Maryland, supra); and Hoffman v. Alaska, 404 P.2d 644 (1965) [Denial of counsel to an indigent probationer violates The Equal Protection Clause of the Fourteenth Amendment, citing Griffin v. Illinois, 351 U.S. 12 (1956).] 7/

In commenting upon the decision in Brown v. Warden, supra, the editor of Criminal Law Bulletin, Volume I, No. 9, p. 34 (November, 1965), had this to say:

> "We disagree. Although the initial grant of probation may be a matter of grace, its revocation nevertheless results in a deprivation of the probationer's liberty. It is imperative, therefore, that the revocation proceedings be consonant with established principles of due process. In our opinion, these principles are violated where a defendant is denied the assistance of counsel in connection with the evidentiary hearing held to establish the alleged probation violation. See United States ex rel. Harton v. Wilkins, 342 F.2d 529 (2nd Cir. 1965); Commonwealth ex rel. Remeriez v. Maroney, 415 Pa. 534, 204 A.2d 450, 451 (1964). Cf. United States v. Behrens, 375 U.S. 162 (1963), which holds that a federal defendant is entitled to counsel upon his return to the District Court for resentence after receiving a maximum sentence and completing a 90 day study under 18 U.S.C. 4208 (b)."

7/ A survey was taken of trial court judges in the six largest Washington State counties (Cowlitz, King, Kitsap, Kittitas, Spokane and Yakima). Most of the judges responded that they do not appoint counsel for probation revocation hearings, "however, some of those who do not appoint counsel have some qualms about the fact that they have not done so." Amandes and Stevens, The Defense of Indigent Persons accused of Crime in Washington - A Survey, 40 Washington Law Review 78, 85 (1965).

The right to counsel at a probation revocation proceeding was also recognized in Model Penal Code § 301.4 [Tent. Draft No. 2 (1954) and 4 (1955)].

The basic nature of probation revocation proceedings, and the need for counsel at this stage, is well summarized in Kadish, supra, at 833:

> "[T]he determination to revoke and recommit because of conduct in violation of the conditions on which release was granted, involves, if not exclusively, then at least centrally, the fairly narrowly focused issue of what the conduct of the releasee actually was and whether it constituted a violation of a stated condition, entitling the court or agency to consider whether revocation is thereby indicated. Given the character of the issue to be determined and the fact that the continued liberty of a person depends on the outcome, it is difficult to understand the view sometimes expressed that a lawyer has no proper business in these matters. The central task of ascertaining whether the prisoner has committed the acts alleged, and measuring the acts proven against a standard to which he was obliged to conform is precisely the business of the criminal trial itself where the right to the assistance of counsel has been recognized as one of the 'immutable principles of justice.' Indeed, in many contested revocation proceedings, the conduct charged actually constitutes the commission of a criminal act. No doubt it is simpler and faster for a court or a board to make the determination by whatever means seem to it sufficient to persuade -- whether it be an informal talk with the parole officer or a brief interview with the prisoner or a written report by an investigator. But it would seem patently at war with the central concept of procedural justice to deny to a person with his liberty at stake the opportunity to hear and meet the specific charge against him with the benefit of counsel."

The right to counsel at probation revocation hearings must not be conditioned upon denial of the alleged violation by the probationer. The decision to admit or deny the violation charged is crucial and requires the advice of counsel. Cf. Miranda v. Arizona, supra. For example, petitioner denied the probation violation -- burglary -- when he was first taken into custody (T.23). But he admitted it when he appeared at the hearing without counsel.

(T. 22). Would he have surrendered as quickly if he had had a lawyer? Only with a lawyer at his side would he have been able to put the state to its burden of proof, or effectively cross-examine witnesses against him, or present mitigating circumstances in an attempt to dissuade the judge from revoking probation.

In deciding to revoke probation, the trial judge below attached particular significance to the fact that petitioner had originally denied committing the violation (T. 23). Only an attorney could have presented effective arguments or evidence in diminution of the significance which this particular fact obviously had to the trial judge.

Finally, and of great importance, the statutes and decisions of the State of Washington provide that even at this stage of the proceedings, petitioner could still move to withdraw his original plea of guilty. RCW 10.40.175 (Appendix A, infra, p. A-3); State vs. Farmer, 39 Wn.2d 675, 237 P.2d 734 (1951); State vs. Shannon, 60 Wn.2d 883, 376 P.2d 646 (1962). It is fair to assume that petitioner was ignorant of the right to so move, and, of course, neither the prosecutor nor the trial judge advised petitioner of it. This right is useless if no attorney is present to argue the motion.

II

SENTENCING IS A CRITICAL STAGE IN THE CRIMINAL PROCEEDING, AND THE ASSISTANCE OF COUNSEL IS ESSENTIAL.

The court below has made the surprising pronouncement that a defendant does not have a federal constitutional right to be represented by counsel when, following a plea of guilty and the revocation of probation, he is for the first time sentenced on the criminal charge.[8/] This ruling departs from prior decisions of

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8/ The opinion below applies equally to a situation where probation follows a contested trial.

this court, and from most decisions of other courts within the United States.

In United States vs. Behrens, 375 U.S. 162 (1963), it was held to be error to impose a final sentence upon a prisoner in the absence of the prisoner and his counsel. Since this decision was based upon the language of Rule 43 of the Federal Rules of Criminal Procedure, there was no necessity for the Court to reach the constitutional issue. Nevertheless the Court characterized the right to be present when the "judge's final words are spoken" and "punishment is fixed" as a "right, ancient in the law, [which] is recognized by Rule 32 (a) of the Federal Criminal Rules, which requires the court to 'afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.' " 375 U.S., at 165. In a separate opinion concurring in the judgment, Mr. Justice Harlan referred to the "possible constitutional issues which would be raised" by pending legislation providing that a defendant's presence was not required at final sentencing. 375 U.S., at 168, fn. 2. The language of the opinions recognizes that the right to be present encompasses the right to be present with counsel.

It may fairly be said that the Court has already ruled upon this issue. In Townsend v. Burke, 334 U.S. 736 (1948), petitioner was convicted on a plea of guilty to non-capital offenses, and subsequently asserted a violation of due process in the acceptance of his plea and imposition of sentence without being advised of his right to counsel and without being offered assistance of counsel. In reviewing the proceedings, the Court found elements of substantial prejudice which presence of counsel would have prevented. Accordingly, a due process violation was found. The test employed in assessing the constitutional claim was substantially similar to the test used in assessing right to counsel claims under Betts v. Brady,

316 U.S. 455 (1942). The Gideon case, by overruling Betts v. Brady, supra, and through the operation of Townsend v. Burke, supra, confers the same right to counsel at sentencing as it does at trial. See Kadish, supra, at 806.

Most federal and state decisions have recognized the right to counsel at sentencing, with some variations in rationales. See, e.g., Kadish, supra, at 806-812; Annot., Absence of Counsel for Accused at Time of Sentence as Requiring Vacation Thereof or Other Relief, 20 A.L.R. 2d 1240 (1951).

Sentencing in Washington is as critical a function as trial, or the preliminary hearings and arraignment discussed in White v. Maryland, supra, and Hamilton v. Alabama, supra. A motion to withdraw a plea of guilty can be made any time before judgment and sentence are entered. RCW 10.40.175 (Appendix A, infra, p. A-3); State v. Shannon, supra; State v. Farmer, supra. Whether to permit withdrawal of a plea is discretionary with the trial judge, but the motion must not be denied where it is evident that the ends of justice will be served by permitting entry of a plea of not guilty in its stead. State v. McDowall, 197 Wash. 323, 85 P.2d 660 (1938); State v. Rose, 42 Wn.2d 509, 256 P.2d 493 (1953). This is the stage of the proceedings at which matters in mitigation of sentence can be presented, and objections would be raised to illegal sentences. Furthermore, where sentencing is deferred and a defendant is placed upon probation, a final judgment has not been entered, and an appeal may not be taken until probation is revoked and sentence imposed. State v. Farmer, supra. [9] While few

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9/ This rule was recently modified. An appeal is now permitted following a contested trial even though sentencing is deferred and probation is granted. However, this is permissible only if probation is conditioned upon a fine or serving time in jail and review is limited to claimed trial error. State v. Proctor, 68 Wash. Dec. 2d (Advance Sheets) 808, ___ P.2d ___ (1966).

issues are available on appeal following a plea of guilty, the rule announced by the court below applies equally to the situation in which probation is granted following a trial. Consequently the timing of and need for an appeal presents itself, and a probationer being sentenced needs advice concerning his appeal rights as much as he would if he were sentenced immediately following conviction or a plea of guilty.

The right of appeal is of particular significance in this case. Petitioner's plea of guilty precluded an appeal on issues other than the validity of the statute, the sufficiency of the information, the jurisdiction of the court, or the circumstances under which his plea was made. State v. Rose, supra. Or, if he had moved to withdraw the plea, he could have appealed from a denial thereof. State v. Rose, supra. But this petitioner had an issue to raise on appeal, quite apart from the denial of counsel. In Dillenburg v. Rhay, 68 Wash. Dec. 2d (advance sheets) 481, 413 P.2d 940 (1966), the Washington Supreme Court ruled that the Superior Courts lack jurisdiction over juveniles unless the juvenile court waives jurisdiction after a hearing. See, e.g., Kent v. United States, ___ U.S. ___ (1966). Petitioner did not have a hearing when jurisdiction was waived by the juvenile court, and he accordingly might have been advised to raise this issue on appeal if he had been represented by counsel. 10/

III

PETITIONER DID NOT WAIVE COUNSEL

Admittedly, petitioner did not request representation by or appointment of counsel during his revocation hearing or at the

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10/ Petitioner recently filed a petition for habeas corpus in the Washington Supreme Court on precisely this issue. But the retroactivity of Dillenburg is yet to be determined, and rehearing was granted in Dillenburg on July 7, 1966, with argument scheduled for late September, 1966. 68 Wash. Dec. 2d (Advance Sheets) 953 (1966).

time of sentencing. But as stated in Carnley v. Cochran, 369 U.S. 506, 513 (1962), "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." See Miranda v. Arizona, supra, at ___. Moreover, the petitioner was then seventeen years of age, and his limited education and background mitigated against a knowledgeable waiver. See Johnson v. Zerbst, 304 U.S. 458 (1938). The respondent acknowledged to the court below that " it would seem doubtful that petitioner . . . possessed sufficient prior knowledge of his rights to enable him to completely and intelligently waive right to counsel at said sentencing proceeding." (T. 39) Of even greater importance, the opinion of the court below deals only with the merits and completely ignores petitioner's failure to request counsel during the hearing.

The court below does seem to indicate (Appendix B, infra, p. B-12) that waiver might have occurred because petitioner pleaded guilty and accepted probationary status on the basis of the existing statutes, which, the court said, do not confer a right to counsel. 11/ This novel waiver theory is patently insufficient to deprive this Court of jurisdiction. Cf. N.A.A.C.P. v. Alabama. 357 U.S. 449 (1958). As the dissent below stated:

> "Against this background, even the attorney general expresses some doubt as to petitioner's ability to fully comprehend the nature of his situation at the time of the revocation hearing. And, under the circumstances, it would be somewhat of a strain, to say the least, to assume that he fully appreciated all ramifications of the order of deferred sentence and at the time of entry of that order knowingly, intelligently, and completely waived all constitutional rights

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11/ The court below was saying so for the first time as to the sentencing stage of the proceedings. McClintock v. Rhay, 52 Wn.2d 615, 328 P.2d 369 (1958), held sentencing to be part of a criminal proceeding, requiring the appointment of counsel. The McClintock case, which preceded petitioner's plea of guilty, was overruled in this case. In fact, the trial court ignored McClintock in imposing sentence without appointing counsel.

with respect to subsequent proceedings. Johnson v. Zerbst, 304 U. S. 458 . . . ." (Appendix C, infra, p. C-14)

IV

THE DENIAL OF COUNSEL TO AN INDIGENT PROBATIONER IS AN UNCONSTITUTIONAL DISCRIMINATION.

A probationer financially able to employ counsel for his probation revocation hearing obviously will do so. The decision below thereby creates discrimination between probationers who can afford counsel and those who cannot. The Due Process and Equal Protection Clauses of the Fourteenth Amendment "prohibit the accident of economic ability from being a criterion for right to counsel. See Douglas v. California, 372 U. S. 353 . . . (1963); Griffin v. Illinois, 351 U. S. 12 . . . (1956)." (Appendix C, infra, p. C-13, dissenting opinion.)

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

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August 5, 1966.

APPENDIX A

STATUTES

78 Statutes 552, 18 United States Code, § 3006A (b):

(b) Appointment of counsel.--In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States commissioner or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The United States commissioner or the court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown. Counsel appointed by the United States commissioner or a judge of the district court shall be selected from a panel of attorneys designated or approved by the district court.

Revised Code of Washington (RCW):

9.54.020 Taking motor vehicle without permission. Every person who shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle, whether propelled by steam, electricity or internal combustion engine, the property of another, shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of a felony.

9.95.200 Probation by court--Board to investigate. After conviction by plea or verdict of guilty of any crime, the court upon application or its own motion, may summarily grant or deny probation, or at a subsequent time fixed may hear and determine, in the presence of the defendant, the matter of probation of the defendant, and the conditions of such probation, if granted. The court may, in its discretion, prior to the hearing on the granting of probation refer the matter to the board of prison terms and paroles or such officers as the board may designate for investigation and report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant, his proper record, and his family surroundings and environment. In case there are no regularly employed parole officers working under the supervision of the board of prison terms and paroles in the county or counties wherein the defendant is convicted by plea or verdict of guilty, the court may, in its discretion, refer the matter to the prosecuting attorney or sheriff of the county for investigation and report.

9.95.210 Conditions may be imposed on probation. The court in granting probation, may suspend the imposing or the execution of the sentence and may direct that such suspension may continue for such period of time, not exceeding the maximum term of sentence,

except as hereinafter set forth and upon such terms and conditions as it shall determine.

The court in the order granting probation and as a condition thereof, may in its discretion imprison the defendant in the county jail for a period not exceeding one year or may fine defendant any sum not exceeding one thousand dollars plus the costs of the action, and may in connection with such probation impose both imprisonment in the county jail and fine and court costs. The court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary (1) to comply with any order of the court for the payment of family support, (2) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question, and (3) to pay such fine as may be imposed, and court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required, and may require bonds for the faithful observance of any and all conditions imposed in the probation. The court shall order the probationer to report to the board of prison terms and paroles or such officer as the board may designate and as a condition of said probation to follow implicitly the instructions of the board of prison terms and paroles. The board of prison terms and paroles will promulgate rules and regulations for the conduct of such person during the term of his probation.

9.95.220 Violation of probation--Rearrest--Imprisonment. Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.

9.95.240 Dismissal of information or indictment after probation completed. Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, may at any time prior to the expiration of the maximum period of punishment for the offense for which he has been convicted be permitted in the discretion of the court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the court may in its discretion set aside the verdict of guilty; and in either case, the court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right in his probation papers: PROVIDED, That

in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.

10.40.175 Substitution for plea of guilty. At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted.

APPENDIX B

OPINION OF THE COURT BELOW

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF AN APPLICATION for a Writ of Habeas Corpus of JERRY DOUGLAS MEMPA, Petitioner, v. B. J. RHAY, Superintendent, Washington State Penitentiary, Respondent.	No. 38470 EN BANC Filed JUN 23 1966, 1966.

This matter involves a petition for a writ of habeas corpus. The salient facts are: Petitioner, Jerry D. Mempa, was charged in the Superior Court for Spokane County with "joy-riding," as defined and prohibited by RCW 9.54.020. At his arraignment in that court, the petitioner was represented by court-appointed counsel, Willard S. Roe, then a prominent member of the Spokane Bar, and now a judge of the Spokane County Superior Court. Mempa, with the advice of counsel, entered a plea of guilty to the charge of "joy-riding." He was granted the privilege of probation status, and the imposition of the

sentence was deferred pursuant to the provisions of RCW 9.95.200 and 9.95.210. Thereafter (approximately two months later), the Spokane County Prosecutor's Office moved to have Mempa's probation status revoked for violation of the terms and conditions under which it had been granted. At a hearing in the Spokane County Superior Court, the petitioner's probation was revoked. Sentence (the statutory maximum term of imprisonment of ten years, subject, of course, to subsequent parole board action determining the actual period of institutional confinement or custody) was then imposed and, promptly thereafter, judgment, sentence, and an order of commitment were entered accordingly.

The basis of this petition for a writ of habeas corpus may be concisely described as follows: Jerry D. Mempa was not represented by counsel at the peremptory hearing in the Spokane Superior Court when (a) his probation status was revoked, (b) the deferral of sentence was vacated, and (c) its imposition took effect forthwith.[1] Thus, the problem presented to us for decision is whether probationer Mempa was entitled to counsel as a matter of constitutional right in relation to any one or all of the foregoing aspects of administration of the state probation system.

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[1] Relative to a deferred sentence, RCW 9.95.220 provides:

> If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.

At this juncture some observations regarding the nature of probation--what it is and is not--may be helpful to an understanding of our decision herein denying Jerry D. Mempa's petition for a writ of habeas corpus. It should first be noted that probation is a very useful and flexible tool or technique of modern penal administration. In fact, few well-informed people would disagree respecting the desirability of the objectives of probation and its constructive potential as a modern penal device for the rehabilitation of criminal offenders. Probation permits special handling of carefully selected criminal offenders who have pleaded guilty, or have been convicted of committing an offense against society. Perhaps in one sense the significant characteristic of the probation device is that the person who is fortunate enough to qualify and to have been granted probation status is allowed to be at liberty in the community. However, the probationer's ostensible "liberty" is somewhat misleading in that he is actually under probation supervision. Thus, while the probationer is not confined to a penal institution, he remains in "semi-custody." The purpose or theory of such an arrangement is that probation status, with attendant supervision and its emphasis upon law-abiding, responsible conduct on the part of the probationer, can be most conducive to the rehabilitation of criminal offenders as useful members of society.

However, probation, or the acquisition of probation status, must be kept in proper perspective. It is not a matter of constitutional right. It is a matter of privilege

or grace, authorized by the state legislature to be granted or initially implemented solely through an exercise of judicial discretion by the Superior Court judges of the state. State ex rel. Schock v. Barnett, 42 Wn.2d 929, 259 P.2d 404 (1953).

Furthermore, the fact must not be overlooked that probationers, as a class, are criminal offenders, both in a legal and social or community sense. And, once again, it should be remembered that each such person who is afforded the privilege of probation status by a judge of the superior courts of this state has either (a) pleaded guilty, or (b) has been convicted of an offense prohibited by the criminal laws of the state of Washington. No inference is intended that, once having broken the law, such individuals are forever branded as criminals and forever afterward are to be treated as such. But the plain emotionally unvarnished facts are that probationers have broken the law. They have a criminal record; and as a result society has a substantial interest in guiding or conforming their future conduct--if not in terms of atonement or punishment, then clearly in terms of the possibility of their rehabilitation as productive members of society.

While those having probation status are accorded considerable freedom and liberty, their status and rights in this respect, and the matter of their liberty and freedom as well as limitations and termination thereof, are not to be placed in the same category with the quantum of rights the average law-abiding citizen possesses with respect to civil liberty and

freedom. Stated another way, probationers are not average, consistently deserving law-abiding citizens. They have exhibited in the past a tendency (at least in one instance) to engage in legally disapproved antisocial conduct.

Considering probationers as a class of criminal offenders, there is a close analogy between their status and the status of others who have pleaded guilty--or have been convicted--and have been committed to institutional custody, supervision and discipline rather than being granted probation. The administration and control of the activities and conduct of the latter group is of course performed by the prison authorities. It would seem farfetched to suggest that the courts should invade this particular sphere of administrative prerogative and, by judicial fiat, exercise some sort of supervisory authority over existing prison administration, standards and practices.

In terms of further insight into the nature of probation and the administration of the probation system, similar reference and analogy could also be made to the functions of the State Board of Prison Terms and Paroles. The Board fixes the period of confinement and the terms and conditions of parole of those criminal offenders who have been committed to state institutional custody. In addition, the Board has the authority and the responsibility for administration of the state probation system. Judicial scrutiny, review, and control over the everyday matters of prison administration and/or parole administration is not only <u>not feasible</u>; it is <u>inadvisable</u> in the light of the particular expertise and training

necessary to provide effective institutional custody and parole supervision. Judicial invasion of prison administration inevitably would be most disruptive of prison programing, supervision, and discipline. The courts cannot and should not be expected to go into the prisons and decide which prisoners should be treated as "trustees." The point is obvious: prison officials must have effective control and authority in order to maintain an effective prison program. The same can be said of probation programing and administration.

Administrative and field probation officers, as well as prison officials, work diligently to establish workable programs for effective guidance of criminal offenders under their supervision and in their semicustody. Easy access to the courts by probationers to re-evaluate, or challenge, varied aspects of probation programing could well be disastrous in terms of the operation of the Washington state probation system. We are convinced that effective supervision of the probation vehicle by probation officers is a sensitive area, and one not particularly suited to detailed, over-all, or even general judicial supervision.

It may seem somewhat more appealing and persuasive to contemplate according full due process rights and privileges to probationers with respect to the termination of their liberty to be at large in their communities than would be the case with respect to the termination of the privileges of prison inmates. However, we are convinced that, while there are some differences

in the status and the potential for rehabilitation as between probationers, inmates, and parolees, the problems of administration and the objectives are basically similar in all three areas. To reiterate: there are no constitutional rights respecting the acquisition of probation status. Logically and rationally, there should be correlatively few, if any, constitutional rights and standards controlling the revocation of probation and matters of administration and supervision of those who have been granted that status.

The above outlined judicial views about the general nature of probation are re-enforced by the following language of RCW 9.95.220, which sets out certain legislative policy determinations made with respect to the operation of our probation system. This legislation provides as follows:

> Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed. (Italics ours.)

It should be noted that the foregoing statute provides that any peace officer or state parole officer may re-arrest a probationer without warrant or other process; furthermore, that the court may thereupon, in its discretion, without notice, revoke and terminate such probation. The statute further provides that suspended or deferred sentences may be summarily revoked, sentence imposed, judgment rendered, and the defendant delivered to the sheriff for transfer to the state penitentiary. While it is true that the revocation of probation does occur in court, and the function is performed by a judge of the superior court, there is nothing in the statute enacted by the legislature to require the observance and application of due process standards as to this facet of the administration of the state probation system. We are not inclined, judicially, to impose, and to judicially assume responsibility for applying to probation those due process standards which unquestionably are applicable and must be observed in the more orthodox aspects of criminal law administration.

State v. Shannon, 60 Wn.2d 883, 889, 376 P.2d 646 (1962), contains the following statement:

> (f) Imposition of sentence, following revocation of probation, particularly in felony cases, is part of the criminal prosecution within the contemplation of Const. Art. 1, § 22 (amendment 10), at which time a defendant is entitled to be represented by counsel. In re McClintock v. Rhay, 52 Wn.(2d) 615, 328 P. (2d) 369; In re Levi, 39 Cal. (2d) 41, 244 P. (2d) 403.
> (First italicized portion ours.)

The petitioner relies strongly on the foregoing views expressed in Shannon. But the basic doctrinal premise of petitioner's

argument seems to be that the principle applied in the landmark decision in Gideon v. Wainwright, 372 U.S. 335 (1963), should be applied, or extended and made to apply, in a probation context.

We will first discuss the above-quoted portion of the decision of this court in State v. Shannon, supra. The criminal offender therein initially pleaded guilty to grand larceny. His sentence was deferred, and probation granted. As in the instant matter, violations of the conditions of probation were reported. A revocation hearing was held at which the defendant was not represented by counsel and offered no evidence to counter reported noncompliance with the conditions of probation. Probation was revoked, and sentence was imposed. The criminal offender was thereupon transferred from probation supervision and custody to prison supervision and custody. The former probationer who thus became an inmate of the state penitentiary filed a petition for a writ of habeas corpus in the Superior Court for Walla Walla County. The matter was remanded to the Superior Court for Thurston County where the prisoner had been tried and convicted. That court vacated the prior revocation of the criminal offender's probation and, furthermore, appointed counsel to advise and represent the petitioner at a hearing to be held on the question of whether or not probation status should be revoked and sentence imposed. The Superior Court for Thurston County, with the defendant and his court-appointed counsel present, reached the same result as at the previous probation revocation hearing when the probationer had not been represented by counsel. In other words, probation was revoked,

and, immediately thereafter, sentence was imposed by the court. The defendant in the Shannon case thereupon appealed.

In the Shannon opinion this court, as indicated hereinbefore, did, in fact, comment upon the right to counsel in a probation context; i.e., the right to counsel apropos of (a) the revocation of probation and (b) the imposition of sentence. The language of Shannon cited by the petitioner herein could admittedly be interpreted, and extended, to the effect that a probationer whose status has been revoked has the right to counsel in a due-process constitutional sense at the imposition of his suspended or deferred sentence following revocation of his probation. However, there was in fact no issue of the right to counsel explicitly before this court in Shannon. The reason should be quite obvious. The probationer in Shannon was in fact represented by court-appointed counsel in the Thurston County Superior Court at the time of revocation of probation and the imposition of sentence. The issues specifically raised in Shannon are not issues herein.

State v. Shannon, supra, construed on the basis of the facts and the issues involved, and properly limited to the decision therein, is not apt in terms of the facts in the instant application for habeas corpus by Jerry D. Mempa. Furthermore, the statements in Shannon as to an alleged right to counsel at a hearing concerning revocation of probation and at the time of subsequent imposition of sentence constituted dicta which, upon further consideration, the court is reluctant and unwilling to apply in the instant case as the law of this state.

We also note in passing that In re McClintock v. Rhay, 52 Wn.2d 615, 328 P.2d 369 (1958)--cited in State v. Shannon, supra--did not involve revocation of probation and imposition of sentence. It is therefore distinguishable on this basis and provides no support for the claim of Mempa for a writ of habeas corpus in the instant case.

In this connection, we do not read State v. O'Neal, 147 Wash. 169, 265 Pac. 175 (1928), an early case involving a suspended sentence and a situation somewhat akin to the modern concept of probation, as being inharmonious with our reasoning in the instant case.

Insofar as State v. Shannon, supra, In re McClinock, supra, and State v. O'Neal, supra, may be inconsistent with the views expressed in this opinion, they are hereby overruled.

Our views as to the problem presented in the instant case may be summarized as follows: While probation is a modern innovation with much constructive potential in terms of the possible rehabilitation of criminal offenders, probation status, or the granting of it by the courts, is a matter of grace or privilege to be granted solely in the discretion of the courts. In the state of Washington the legislature has established a state probation system and has provided for its functions, operations, and administration. The legislature has not prescribed that due process standards shall be observed and applied by the superior courts of Washington in the very limited, but admittedly significant, function performed in granting, denying, limiting and terminating probation status

of criminal offenders. We have previously held that there are no constitutional rights respecting the acquisition of probation status. And it is furthermore our reasoning that there are no constitutional rights involved in the termination or revocation of probationary status, or in respect to the concomitant operations of the superior courts involving imposition of either (1) suspended or (2) deferred sentences. The function involved, in terms of definitive action, is essentially quasi-administrative or plenary in nature. The operations are essentially no different from those performed administratively by the State Board of Prison Terms and Paroles or by the prison authorities in administering other phases of penal administration in the state of Washington.

A criminal defendant adequately represented by counsel, who, with counsel at his side, upon the entry of a plea of guilty or in a trial culminating in conviction accepts probation status, does so on the basis of the existing statutes. These clearly authorize termination of probation and imposition of sentence without notice and without reference to allegations of denial of constitutional rights, admittedly pertaining to more orthodox criminal proceedings in the trial courts of this state. In such a context it may even be said there has been a waiver of any right to claim denial of criminal due process procedure in a proceeding involving termination of probation status and the imposition of sentence.

Underlying petitioner Mempa's claim in the instant

case, there may have been, as indicated, some conjecture that the principles announced in the landmark Gideon case should apply or should be extended to proceedings involving revocation of probation and imposition of previously (a) suspended or (b) deferred criminal sentences. We are not constrained to read or apply Gideon in such a manner in the format or context of the administration of probation. Petitioner Mempa was adequately represented by counsel at the time he entered a plea of guilty and accepted the probation status. Thus, the petitioner was accorded full due process considerations at the appropriate time. He can make no valid claim of deprivation of an alleged constitutional right--at least not in a deferred sentence, probation, semicustody administrative context.

Nor can there be any valid contention that the decision of the United States Supreme Court in Escoe v. Zerbst, 295 U.S. 490 (1935), is directly controlling of the instant matter. That decision involved a petition for a writ of habeas corpus by an inmate of a federal penitentiary whose probation had been revoked by a federal district judge on an ex parte showing without the probationer being brought before the court. The main thrust of the opinion is that such a procedure clearly contravened the intent of Congress as expressed in the language of the applicable federal probation statute--requiring that "such probationer shall forthwith be taken before the court." The Escoe opinion clearly negates the applicability of any specific constitutional safeguards and negatives the existence of constitutional due process

rights pertaining to matters involving the revocation of federal probation. The above-mentioned federal statutory requirements constituted the sole basis for granting the writ of habeas corpus.

Furthermore, Escoe v. Zerbst, supra, did not involve any question of right to counsel--either at the probation hearing or at the imposition of sentence; and right to counsel at either stage of the proceedings is the only question raised by the petition in the instant case.

Thus, we do not regard the policy considerations and value judgments of the United States Supreme Court, as enunciated in Escoe v. Zerbst, supra, to be controlling relative to our disposition of the instant matter. The appropriate federal statute required the presence of the probationer before the court during hearings concerning revocation of probation. The Washington statute likewise requires that "he shall cause the probationer to be brought before the court wherein the probation was granted." But there is no further statutory requirement as to presence of counsel, burden of proof, right to confront witnesses, et cetera.

In all fairness to a probationer--and consonant with regular and orderly court procedure--we would anticipate that probationers should and will be given an opportunity to present their side of the story to the court respecting reported violation of the terms or conditions of probation. But the scope of any such inquiry or hearing rests solely in the discretion of the superior court judges of the state of Washington.

No appeal, or a petition for a writ of habeas corpus, will be successful in this court where the question is whether the probationer was accorded his constitutional due process rights at the hearing. He simply has none.

For the foregoing reasons, we find no merit in petitioner Mempa's allegations of denial of constitutional criminal due process procedural rights in the instant case. The application for habeas corpus should be denied. It is so ordered.

FINLEY, J.

WE CONCUR:

ROSELLINI, C. J.

HILL, J.

OTT, J.

HUNTER, J.

HALE, J.

APPENDIX C

DISSENTING OPINION BELOW

No. 38470

HAMILTON, J. (dissenting)--I dissent. The majority, in overruling those portions of State v. O'Neal, 147 Wash. 169, 265 Pac. 175 (1928), In re McClintock v. Rhay, 52 Wn.2d 615, 328 P.2d 369 (1958), and State v. Shannon, 60 Wn.2d 883, 376 P.2d 646 (1962), which inferentially or directly characterize imposition of criminal judgment and sentence as part of a criminal prosecution, have taken, in my view, an unwarranted, unjustified and unrealistic step backward in the administration of justice. They do this at a time and in an era when constitutional rights and due process concepts are receiving increasing and expanding attention. And, by so doing, they open the door to and invite continued and increasing federal court disapproval and supervision of state court criminal procedures. We have gone through this in connection with search, arraignment, appointment of counsel, and confession procedures. Fortunately, in this state, we have been able to adapt to new concepts without undue inconvenience, principally because our procedures have been administered in the most part with befitting and uniform regard to fundamental fairness in the treatment of individuals before our criminal tribunals. When, however, we depart from fundamentally fair judicial processes, and cavalierly authorize discrimination in the right to counsel between one whose judgment and sentence is imposed immediately following conviction or plea of guilty and one

whose judgment and sentence may be imposed anywhere from a few months to several years later, we are inviting probation and revocation procedures which can well lead to questionable and potentially voidable institutional commitments. Given no requirements for representation by counsel, it is inevitable that revocation procedures will vary from defendant to defendant, from county to county, and from trial judge to trial judge. Such a situation may be acceptable in some administrative contexts; but it can hardly be said to comport with the dignity of the judicial process or the traditional role of courts in criminal proceedings. Neither does it lend itself to the efficient administration of justice, for to short change an individual of any due process protections at the trial court level, when and where they can in the first instance be most effectively, efficiently and economically provided, is simply not good judicial policy. Disparity of standards among the courts in the search, confession and right to counsel cases has long since proven the unwisdom and inefficiency of such a course.

I have no quarrel with the majority's thesis that an errant individual who has been released from official custody by way of an order of deferred sentence remains, technically speaking, in "semi-custody" by virtue of probationary regulations. Neither do I differ with the theory that deferred sentences and probation are rehabilitative measures which descend upon the deserving miscreant "by the grace" of the sentencing

judge. But, I find little realistic support for the majority's denial of the right to counsel either at the time of hearing or of final judgment and sentence arising out of these fine phrases. It is one thing to say that there is no constitutional or due process right to the chancellor's "grace," but quite another thing to say there are no due process rights at such a critical stage of a criminal prosecution as the revocation of probation and the imposition of final judgment and sentence. The two simply do not go hand in hand.

It cannot be gainsaid that the recipient of the "grace" of an order of deferred sentence is the beneficiary of some very real and substantial advantages which do not flow to one who is sentenced to a custodial facility, or who is otherwise subjected to a final judgment and sentence. The individual with the order of deferred sentence in his hand is ordinarily permitted to return to his community, his family and his job, subject only to the behaviorial restrictions and conditions arising out of his probationary status. In a very realistic sense he is free, for his personal liberty is but slightly restricted. And, of significant importance, he is accorded the right, after a successful probationary period, of coming before the court and petitioning for a negation of his conviction and a dismissal of the charges. He may thus clear his record and remove outstanding penalties and disabilities. This latter privilege, even if unaccompanied by the other benefits, is a matter of considerable

importance in our society today. It is clearly distinguishable from a procedural right. It amounts to a substantial right which is afforded by legislative enactment. RCW 9.95.240. Fundamental fairness and the dignity of the judicial process dictate that this right, to say nothing of the sacred right of personal liberty, should not be subject to nullification by the whim of peremptory "quasi-administrative" proceedings which do not even afford the right to be represented by counsel at the time of entering the nullifying judgment and sentence.

This court has held in State v. Farmer, 39 Wn.2d 675, 237 P.2d 734 (1951), that the recipient of an order of deferred sentence is not entitled to an appeal from his conviction until entry of final judgment and sentence.[1] Thus, the majority's view that due process concepts are fulfilled by affording counsel at the time of entry of the order deferring sentence, and that such concepts do not contemplate the right to counsel at any time thereafter to and including the time of entry of final judgment and sentence following a revocation proceeding is somewhat anomalous. In effect, the majority isolates this particular judgment and sentence from the context and concept of the

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[1] Of course, it is understood that the right of appeal following a plea of guilty is very limited. However, the deferred sentence statute permits entry of such orders following either a plea of guilty or a verdict of guilty. Hence, the right to counsel at the time of revocation must be considered in the context of either form of conviction.

ordinary criminal prosecution and says to the individual, you may now appeal for the first time in this prosecution; but, because you initially received a deferment of sentence, you are not now entitled to counsel to advise you of this right or to assist you in determining that a proper sentence is imposed. The reason for this legalistic tightrope walking is obscure to me, particularly when considered with the fact that the final judgment and sentence, whether entered with or without an intervening order of deferred sentence, bodes well to deprive an individual of his personal liberty and to forever nullify any opportunity of clearing his record of the conviction.

The majority seek sustenance for their position in the statute dealing with revocation of suspended or deferred sentences. They quote with emphasis RCW 9.95.220, which provides in part that the superior court may, in its discretion, without notice, revoke and terminate probation. It may be granted that the statute purports to dispense with formal notice as a prerequisite to revocation; however, I find little in the statutory language or in any reasonable concept of fundamental fairness that dispenses with the necessity for some type of hearing or the right to be represented by counsel. On the contrary, by providing that the probationer should be brought before the court, after rearrest for cause, i.e., violating his probation, it is fair to assume the legislature anticipated that a judicious judicial proceeding would ensue, during the course of which the

fundamental rights of society as well as those of the probationer would be respected. Certainly, the legislature did not intend that the courts should, at this stage of the prosecution, shed their traditional concern for fair play and due process concepts and assume a swashbuckling "quasi-administrative" attitude toward a defendant. At this point, it should be observed in passing that the legislature, in enacting standards for revocation of parole, provided that a parolee charged with a violation of his parole, short of conviction of another crime, would be entitled (a) to a fair and impartial hearing before the parole board, (b) to be represented by counsel at such hearing, and (c) to defend and present evidence on his own behalf. RCW 9.95.120. Thus, we have the incongruent situation of a convicted, incarcerated and paroled person possessed of more fundamental rights before an administrative board than this court is willing to afford to a probationer in a court of law.

Again, it seems to me, it is one thing to say that there is no legislative, constitutional or due process requirement of formal notice of a projected probation revocation, but quite a different thing to say there is no legal requirement for holding a hearing, assessing the reason for revocation, or affording counsel, if not at the hearing, at least at the time of entry of an appealable judgment and sentence.

The majority also appear to proceed upon the premise that once a person stands convicted of a crime and qualifies for

and partakes of the conditional liberty afforded by an order of deferred sentence, he is immediately shorn of constitutional safeguards which otherwise surround a criminal prosecution. In short, the majority cast such a trespasser into the role of a second class citizen, despite the fact that his past history suggests the probability of reformation and warrants the grace of probation. It may be conceded that such a person, by virtue of the criminal conviction, waives or forfeits the benefits of some constitutional rights, e.g., the right to further trial by jury. But, there seems to be little reason or justification to suppose that such a person waives or forfeits such basic and traditional safeguards as the right to be present at a judicial proceeding designed to revoke his probation, the right to be advised of the nature of the alleged probation violation, the right to present explanatory or mitigating evidence, or the right to be represented by counsel either at the hearing or at the time of imposition and entry of the appealable final judgment and sentence. While these rights as to probationers may not be fully spelled out in the federal and state constitutions, it would seem reasonable to conclude that they inhere in those documents, if in no other way than through the equal protection clause of the fourteenth amendment to the federal constitution. Certainly, there can be little doubt that the right to personal liberty is as valuable and sacred to one who has been convicted of a crime as to one who has not. I find nothing in our

constitutions that indicates a contrary belief. Neither can it be seriously questioned that the strength of our constitutional form of government lies in the protection afforded to the weak and unfortunate against injustice or arbitrary and capricious action. And, if this be so, it ill behooves us to sap this strength by isolating, with surgeon-like precision, various phases of a criminal prosecution for the purpose of parceling out, with Scrooge-like finesse, due process protections. Thus, it seems incompatible to say to a defendant that he is entitled to constitutional safeguards in all the usual facets of a criminal prosecution, including the right to counsel at all stages of the proceeding, unless and until he is granted probation, whereupon due process concepts and society's interest in the preservation of fair standards of justice vanish in the mystical clouds of judicial grace. Instinctively one shrinks from this autocratic approach, for instinctively one feels that any person is entitled to be properly heard when a court of law undertakes to deprive that person of his personal liberty, conditional though that liberty might be.

The majority next point out that deferred sentences and probation are comparatively modern, flexible, sensitive and potent innovations in the field of criminology. From this they then posit that courts should be slow to translate into constitutional terms the theory that the "privilege" of probation is a matter of "grace," and that revocation is a matter of

"discretion." The majority, however, distort the probation concept and attach too much significance to the above quoted words when they characterize the revocation procedure as a quasi-administrative function, and thus seek to carry it beyond constitutional dimensions and beyond the normal range of the judicial process.

The adjudication of criminal guilt and the meting out of statutory punishment is distinctively, traditionally and constitutionally a judicial function. It is no more an administrative function than granting, denying or modifying a divorce decree, and it does not partake of an administrative function simply because there are alternative solutions available in a given case. With but relatively few statutory exceptions, the administrative function in the field of penology basically begins and ends with the supervision of the convicted offender. Because both the judge and the administrator may be interested and concerned with reformation of the offender does not mean that their functions become indiscernably commingled, and, because a judge may accept, reject, or modify a recommendation of probation or revocation by an administrator does not mean that the judiciary is disruptively invading a peculiarly administrative province.

The bare and unvarnished truth is that the courts should and do stand as a bulwark between the individual and the possibility of mistaken, prejudiced, whimsical or arbitrary

administrative action. And, when the courts obeisantly hesitate to surround any facet of their proceedings and any individual involved therein with adequate, even though minimal, constitutional safeguards they are abdicating their responsibility.

The majority appear willing to concede that, while the granting of probation in the first instance is not a matter of right, a defendant is constitutionally entitled to be represented by counsel at that point. The stakes then are the defendant's liberty, his reputation and future record, and his appellate remedies. The state is represented by the prosecuting attorney. If the defendant receives a deferment of sentence and probation and subsequently stands before the same court accused by an administrative officer of a probation violation, the stakes are identical. The state is again represented by the prosecuting attorney and to some degree by the administrative officer. The defendant, however, now stands barren of a right to the assistance of counsel. I find no purpose, reason or fairness in this situation.

The fear that the presence of counsel would tend to convert such proceedings into protracted hearings is without merit and is nothing more than a red herring. If there is a valid factual issue as to the alleged probation violation, the defendant is not only entitled to a fair hearing, but as a matter of practical necessity he should have the assistance of counsel in evaluating his defense, assembling his evidence,

subpoenaing and interrogating his witnesses, and cross-examining opposing witnesses. The average defendant is otherwise virtually helpless, and it is only in this way that the court can be fully, intelligently and efficiently advised. In the vast majority of cases, however, there is no dispute as to the probation violation. The only issue is the nature and extent of the punishment, a matter of vital concern to both the defendant and the court. Here again counsel, with his knowledge of court procedures, the defendant's background, and the alternative solutions available can be of inestimable assistance to the defendant and of substantially more help than hindrance to the court. At the very minimum, the presence of counsel would assure the court that the defendant was advised of his situation, and remove the lurking feeling of unfairness that surrounds sending an unrepresented person to a penal institution.

Likewise without merit is the fear that providing constitutional safeguards at the revocation stage would weaken the rehabilitative purposes of probation. Retribution, however swift, should always be accompanied by fundamental fairness, particularly when administered by and through a court of law. In fairness to any probationer, the procedures utilized should be designed to avoid the possibility, however remote, of revocations founded on accusations arising out of mistake, prejudice and caprice. The threat of arbitrary or whimiscal commitment does not tend to encourage either cooperation or

successful rehabilitation. Reformation can best be accomplished by fair, consistent, and straightforward treatment of the individual. No doubt it was this thought, in part at least, which prompted the drafters of the Model Penal Code for The American Law Institute to provide, in Tent. Drafts Nos. 2 (1954) and 4 (1955), § 301.4, as follows:

> The Court shall not revoke a suspension or probation or increase the requirements imposed thereby on the defendant except after a hearing upon written notice to the defendant of the grounds on which such action is proposed. The defendant shall have the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel.

Finally, and perhaps fatally, the denial of counsel to a defendant at the revocation stage of probation could well raise serious constitutional questions of discrimination between affluent and indigent probationers. As the majority opinion inferentially points out, in all instances a probationer appearing before the superior court in a revocation proceeding will ordinarily be given an opportunity to be heard. As a practical and realistic matter, those probationers who can afford counsel will be accorded the opportunity of having counsel at their side throughout the proceeding. It would, indeed, be the rare superior court judge who would deny them such a privilege. Yet the majority would deny this right to indigents, thereby projecting discrimination between probationers who can afford counsel and those who cannot. Due process and equal

protection prohibit the accident of economic ability from being a criterion for right to counsel. See Douglas v. California, 372 U. S. 353, 9 L. Ed. 2d 811, 83 Sup. Ct. 814 (1963); Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 Sup. Ct. 585 (1956).

Turning then from the general to the specific, the majority opinion, as it relates to petitioner, in effect concludes that petitioner by accepting a deferred sentence knowledgeably waived any and all rights to due process of law at the time of any subsequent revocation proceeding. Aside from the fact that it is extremely doubtful that any such theory of waiver was fully explained to petitioner at the time of the entry of the order of deferred sentence, the harshness and rigidity of the position taken by the majority is but emphasized by the facts appearing in this case. It is conceded by the attorney general, and supported by the record, that at the time of the offense, the arraignment proceedings and the revocation, all in 1959, petitioner was but 17 years of age. The record further indicates that petitioner had not completed the eighth grade, and that since 1956 he had progressed through a variety of state institutions including Green Hill Academy, Eastern State Hospital, the Diagnostic Center at Fort Warden, Western State Hospital, and again Eastern State Hospital with a conflict of opinion between the latter two facilities as to whether he was a psychopathic delinquent. His migrations through these various institutions were under the aegis of the

juvenile court. His first appearance in superior court arose out of the offense for which he is presently in custody.

Against this background, even the attorney general expresses some doubt as to petitioner's ability to fully comprehend the nature of his situation at the time of the revocation hearing. And, under the circumstances, it would be somewhat of a strain, to say the least, to assume that he fully appreciated all ramifications of the order of deferred sentence and at the time of entry of that order knowingly, intelligently and competently waived all constitutional rights with respect to subsequent proceedings. Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461, 58 Sup. Ct. 1019, 146 A.L.R. 357 (1938).

In summary and in conclusion, I would

(1) Reaffirm the right to counsel at the time of imposition of sentence as established in the O'Neal, McIntock and Shannon cases, supra;

(2) Prospectively overrule that portion of In re Jaime v. Rhay, 59 Wn.2d 58, 365 P.2d 772 (1961), which holds that a probationer is not entitled to counsel at the revocation hearing, and afford such right at all future revocation hearings; and

(3) Grant the writ of habeas corpus and remand petitioner to the sentencing court for rehearing and resentencing with counsel present.

HAMILTON, J.

We X concur in the result of this dissenting opinion.

DONWORTH, J.

WEAVER, J.